

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>VICTOR K. LLOYD</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>OTTAWA TRUCK CORPORATION</b>	)	
Respondent	)	Docket Nos. 258,352 &
	)	1,004,916
AND	)	
	)	
<b>SECURITY INS. CO. OF HARTFORD<sup>1</sup></b>	)	
<b>CONTINENTAL WESTERN INS. CO.</b>	)	
Insurance Carriers	)	

**ORDER**

Respondent and Royal & SunAlliance Insurance Co. as well as claimant requested review of the April 5, 2004 Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on October 5, 2004. The Division of Workers Compensation's Director appointed E.L. Lee Kinch of Wichita, Kansas, to serve as Board Member Pro Tem in place of Julie A.N. Sample, who recused herself from this proceeding.

**APPEARANCES**

George H. Pearson of Topeka, Kansas, appeared for the claimant. Joseph C. McMillan of Overland Park, Kansas appeared for respondent and Royal & SunAlliance Insurance Co. (Royal). Eric T. Lanham of Kansas City, Kansas, appeared for respondent and Continental Western Insurance Co. (Continental).

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

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<sup>1</sup> Security Insurance Co. of Hartford, a subsidiary of Royal & SunAlliance, was respondent's workers compensation insurance carrier. However, the parties and ALJ throughout the litigation referred instead to Royal & SunAlliance as the carrier. For consistency and to eliminate confusion, the Board's Order will likewise refer to Royal as the carrier.

ISSUES

The claimant, in Docket No. 258,352, alleged he suffered a specific traumatic injury to his low back at work on March 14, 2000. The claimant further alleged, in Docket No. 1,004,916, repetitive injuries to his back each and every day worked after March 14, 2000, until he was taken off work for back surgery in July 2002.

The respondent's workers compensation insurance coverage was provided by Royal through January 1, 2001 and then such coverage was provided by Continental. The Administrative Law Judge (ALJ) noted that the primary issue was whether claimant suffered a single accident on March 14, 2000, a series of repetitive accidents while working after that date or both.

The ALJ determined claimant suffered a traumatic injury on March 14, 2000, and that he did not suffer subsequent repetitive injuries. Accordingly, the ALJ determined the claimant suffered a 15.5 percent permanent partial functional impairment in Docket No. 258,352. In Docket No. 1,004,916, the ALJ denied benefits because the claimant did not prove he suffered a series of repetitive use injuries after the March 14, 2000 accident.

The respondent and Royal request review of the following: (1) whether the claimant's accidental injury arose out of and in the course of employment; (2) whether claimant met with personal injury after his release from Dr. Reed's treatment; (3) nature and extent of disability; and, (4) which insurance carrier is liable.

In summary, respondent and Royal argue the claimant suffered injury as a result of repetitive work activities until July 2002. Royal further argues a July 2002 date of accident would be under the coverage provided by Continental and that insurance carrier is responsible for all benefits awarded claimant. In the alternative, Royal argues that if it is determined claimant suffered accidental injury on March 14, 2000, that Royal would only be responsible for claimant's medical benefits up to his release from treatment with Dr. Reed on October 9, 2001. And Royal further argues it would only be liable for a 10 percent permanent partial functional impairment attributable to the March 14, 2000 accident.

Claimant raises the issue whether it was proper for the ALJ to average Drs. Reed and Koprivica's ratings. Claimant argues he is entitled to a 20 percent permanent partial functional impairment based on Dr. Koprivica's rating because Dr. Reed's rating of October 9, 2001, occurred before claimant reached maximum medical improvement.

Respondent and Continental argue the claimant suffered accidental injury on March 14, 2000, and did not suffer additional repetitive injuries. Therefore, Continental requests the Board to affirm the ALJ's Award finding Royal liable for claimant's benefits.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant began work for respondent in 1988. Claimant was employed as a utility person which required claimant to fill in for absent co-workers. As a result claimant performed all of the different jobs in the plant which included welding, painting, fabricating parts and machinist work. But the majority of the work claimant performed as a utility person was spent in fabricating parts.

On March 14, 2000, the claimant was performing the fabricating job. Claimant was placing steel plates weighing 80-90 pounds on a cutting table. Claimant began to experience back pain which radiated into his legs.

The respondent sent claimant to the company doctor who referred claimant for an MRI which was performed on May 5, 2000. The MRI was ultimately interpreted differently by the various physicians. Dr. Frank P. Holladay concluded it revealed mild stenosis at L4-5 and a bulging disk at L5-S1. Dr. P. Brent Koprivica after reviewing the medical records of Dr. Sean Jackson concluded it revealed a central and right-sided protrusion of the disk at L4-5 and an annular tear at L5-S1. Dr. William O. Reed Jr. concluded it simply revealed advanced degenerative disk changes at L4-5 and L5-S1 with a mild herniation at L4-5 on the right side.

After the May 5, 2000 MRI, claimant was then referred to Dr. Jackson and taken off work for six weeks. Claimant was provided medications and epidural injections. Ultimately, Dr. Jackson recommended surgery but the nurse case manager intervened and the respondent referred claimant to Dr. Reed, a board certified orthopedic surgeon, for a second opinion.

An October 2000 myelogram revealed a broad-based disk bulge at L4-5 and a focal central protrusion at L5-S1.<sup>2</sup>

Dr. Reed first examined claimant on December 19, 2000. On January 12, 2001, Dr. Reed performed a diskogram which replicated claimant's pain at L4-5 and L5-S1. Consequently, the doctor then proceeded with an IDET procedure which is described as placing a catheter next to the annulus at those levels in claimant's spine and radio frequency waves are then used to heat the annulus. This procedure can result in immediate pain relief or gradual improvement over a few months.

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<sup>2</sup> Koprivica Depo. at 25.

Although Dr. Reed indicated the claimant's condition improved, the claimant denied the procedure improved his condition. In follow-up visits claimant complained of intermittent sharp pain and by the time of claimant's final visit with Dr. Reed on October 9, 2001, the claimant was complaining of activity-related pain.

Dr. Reed suggested the possibility of surgery consisting of a spinal fusion but released claimant as having reached maximum medical improvement unless he opted to have the surgery. Because claimant had returned to work, Dr. Reed did not recommend surgery at that time. The doctor opined claimant suffered an 11 percent permanent partial functional impairment. Although Dr. Reed opined claimant did not have a herniated disk at L5-S1 during the time period the doctor treated claimant, nonetheless, he noted the diskogram would not necessarily have revealed a disk herniation.<sup>3</sup>

Claimant denied that the IDET procedure provided relief and when he was released to full duty work without restrictions his condition remained the same as after the March 14, 2000 injury. Moreover, claimant noted that after that procedure he essentially did no lifting at work. In the latter part of 2001 claimant was placed in a job operating a lathe. The job requires very little lifting and if lifting is necessary the claimant uses a hoist for the lifting.

Q. You stayed away from the lifting even when you went back full duty?

A. Yes.

Q. Okay. Did you have any restrictions, or was that just something you said, "I can't lift this and I'm not going to do it."

A. After Reed released me, he had me on no restrictions but the people at work knew I had trouble so they didn't make me do it.

Q. So, so really you haven't done any significant lifting since your accident of March 14th of 2000?

A. I try to keep from it, yeah. I'm on 25 pound weight restriction now.

Q. Okay. And you've had surgery since then, correct?

A. Yes.

Q. But up until the time you went to court, you hadn't had any lifting or you hadn't done any significant lifting at work?

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<sup>3</sup> Reed Depo. at 18.

A. No, no.<sup>4</sup>

Claimant's condition continued to bother him and he never received much relief after the March 14, 2000 injury. The claimant testified that his condition remained the same.

Q. Okay. From the time of your - - that Doctor Reed released you until the time you got your surgery from Doctor Holiday [sic] - -

A. Um-hm.

Q. - - were you still working all that time?

A. Yes.

Q. Did your back get better, did it get worse, did it stay the same?

A. It stayed about the same.

Q. You were still having the pains down into your toes?

A. Yes.

Q. The pain shooting down your legs?

A. Yes.

Q. You were still having the low back pain?

A. Yes.

Q. Any other symptoms?

A. No. I mean, just main the low back pain and the shooting of the legs, the shooting pains.

Q. Okay. And that stayed pretty constant all the way up through the time you had your surgery?

A. Yes.<sup>5</sup>

A myelogram performed April 15, 2002 and revealed a large herniated disk at L5-S1. Claimant was then examined by Dr. Frank P. Holladay on May 13, 2002. The results

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<sup>4</sup> R.H. Trans., Resp. Ex. A at 50-51.

<sup>5</sup> Id. at 51-52.

of the myelogram were discussed and surgery was recommended. Royal refused to provide additional treatment because Dr. Reed had released claimant at maximum medical improvement.

A preliminary hearing was scheduled and after hearing arguments of counsel the ALJ ordered respondent to provide claimant additional medical treatment with Dr. Holliday. On July 31, 2002, Dr. Holladay performed bilateral decompressions and microdiscectomies at L5-S1 on claimant.

The primary argument advanced by Royal is that claimant suffered a series of repetitive injuries and consequently his date of accident would be when he had bilateral decompressions and discectomies at L5-S1 on July 31, 2002. This date of accident would place responsibility for claimant's benefits upon Continental.

It cannot be seriously disputed claimant initially suffered accidental injury arising out of and in the course of his employment on March 14, 2000, when he lifted steel plates at work. A few days later claimant complained of pain radiating into both legs and respondent referred claimant to the company physician.

The dispositive issue is whether claimant suffered further injury to his low back after he was released to return to work by Dr. Reed in October 2001. It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.<sup>6</sup> Royal argues claimant's return to work aggravated and intensified his low back condition at L5-S1 and such activity constituted a new accident.

When a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.<sup>7</sup> However, where the worsening or a new injury would have occurred absent the primary injury or where it is shown to have been produced by an independent intervening cause, it is not compensable.<sup>8</sup>

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<sup>6</sup> *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

<sup>7</sup> *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

<sup>8</sup> *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*,<sup>9</sup> the Court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1).

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*,<sup>10</sup> the Court attempted to clarify the rule:

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

The claimant testified that his condition remained the same from the date of the March 14, 2000 accident until he had surgery in July 2002. Claimant denied that he performed heavy lifting after he returned to work or that he suffered an additional injury. The claimant's testimony alone is sufficient evidence of his physical condition.<sup>11</sup>

The claimant received treatment for his low back condition at L4-5 and L5-S1 after the accident on March 14, 2000. Dr. Jackson recommended surgery but claimant was referred to Dr. Reed for a second opinion. After he performed the IDET procedure, Dr. Reed also discussed surgery as a treatment option. In summary, the claimant's treatment consistently addressed claimant's pain complaints at L4-5 and L5-S1 after March 14, 2000.

Dr. Holladay concluded the claimant's disk herniation at L5-S1 evolved over time and was attributable to the March 14, 2000 injury. In response to a question from respondent's attorney the doctor stated that claimant's continued work activities were responsible for the increase in the size of the disk herniation at L5-S1. But Dr. Holladay relied upon a job description he was provided which indicated claimant engaged in significant lifting activities. As previously noted, the claimant did not engage in those activities after he returned to work.

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<sup>9</sup> *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

<sup>10</sup> *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

<sup>11</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, rev. denied 270 Kan. 898 (2001).

Dr. Koprivica concluded that the disk herniation at L5-S1 was a direct and natural consequence of the March 14, 2000 incident at work. Dr. Koprivica testified that he could not state that claimant did not have the herniated disk at L5-S1 when the IDET procedure was performed. While Dr. Koprivica explained that activity caused the L5-S1 disk herniation to increase he explained that without the initial injury that increase would not have happened. Dr. Koprivica testified:

Q. Okay. So even before, if - - if you assume that this herniated disc progressed over two years, at the very beginning of that first - - that two-year period somebody was recommending the exact procedure that he ultimately had?

A. Yeah. And I - - and maybe we're - - there is a misunderstanding of what - - what I was saying. Even though the disc herniation increases in size, and I understood he had some more symptoms, the fact was that it was - - it's a but-for situation in the old days. There's already a tear. There's already disc material extruding. It just got bigger because he continued to do activity, but without that initial injury it never would have happened. That's - - and that's how I interpreted it.<sup>12</sup>

The MRI dated May 5, 2000, indicated a tear at L5-S1. The October 2000 myelogram revealed a broad based disk bulge at L4-5 and a focal central protrusion at L5-S1. The IDET procedure was performed at L4-5 and L5-S1.<sup>13</sup> Finally, a CT myelogram performed April 15, 2002, revealed a large herniated disk at L5-S1. The objective medical evidence supports the finding that claimant's condition, especially at L5-S1 gradually progressed.

The claimant's herniation at L5-S1 gradually progressed as a result of the initial accidental injury on March 14, 2000. Dr. Koprivica concluded such increase was the natural and probable consequence of the March 14, 2000 accident. The Board finds Dr. Koprivica's testimony persuasive and conforms with claimant's consistent pain complaints. The Board affirms the ALJ's determination claimant suffered accidental injury on March 14, 2000, and the resultant surgery was the natural and probable consequence of that injury. Stated another way, neither claimant<sup>14</sup> nor Royal met their burden of proof to establish claimant's condition was aggravated by his work activities after October 9, 2001.

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<sup>12</sup> Koprivica Depo. at 38-39.

<sup>13</sup> It should be noted that Dr. Koprivica testified that the diagnostic tests before the IDET procedure suggested the L5-S1 herniation was present at that time. And Drs. Koprivica and Holladay both noted the diskogram would not necessarily reveal a herniation. Dr. Reed seemed to agree with that although he remained steadfast that there was no herniation when he performed the IDET procedure.

<sup>14</sup> Claimant testified that he did not suffer additional injury after March 14, 2000, but filed the second claim for a series of repetitive injuries after that date as a precaution in the event a later accident date was determined.

Claimant argues that Dr. Reed's rating should not be considered because at the time of his rating the claimant was still symptomatic and received further medical treatment including surgery. The Board finds Dr. Koprivica's rating provided after claimant reached maximum medical improvement following the July 2002 back surgery is more persuasive. Dr. Koprivica explained his rating in the following fashion:

Q. Thank you. Did you make a determination as to whether you felt Mr. Lloyd had sustained permanent impairment from his injury of March 14 of 2000?

A. I did.

Q. And what was your opinion?

A. My opinion was that he had sustained permanent impairment as a result of the March 14th, 2000, injury. He specifically had injury to the annulus at L4-5 and L5-S1 with an initial central and right-sided protrusion of the disc at L4-5 and annular tear at L5-S1. And as time went on he developed a disc herniation at L5-S1 as well. And for that he had undergone two separate surgical procedures. He had had an IDET, I-D-E-T, procedure, at L4-5 and L5-S1. That was followed by a second procedure which was an open bilateral decompression and microdiscectomy at L5-S1. For that - - those conditions I specifically referred to the Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment. In the guides there are two methods in the fourth edition that - - that assign impairment. The first method is known as the injury model. The second method is known as a range of motion model. The preferred method of assigning impairment is the injury model. Under the injury model, if you have a disc herniation with radiculopathy, you have a Category 3 DRE impairment which is a ten percent impairment. Now, in his case, I didn't feel that his situation fit a Category 3 DRE impairment specifically. And the reason was he had two levels of disc herniation. He had had two separate surgical interventions and he also had bilateral decompressions, so he was having radiculopathy into both lower extremities. So for that reason I thought his impairment was more than a ten percent. The alternative method in the guides is known as a range of motion model. And under that model you assign impairment based on specific spine disorder, impairment for loss of motion and then impairment for any permanent neurologic deficit that's present. You combine those three considerations for impairment using the combined values chart on page 322, and that comes up with a percentage. Now, the guides outline that you can use the range of motion model as a differentiator to determine if a person should be in a different category, DRE category under the injury model.<sup>15</sup>

Dr. Koprivica then assigned an impairment for claimant's spine disorder, loss of motion and neurologic deficit to arrive at a 21 percent permanent partial whole person functional impairment. Because a 21 percent impairment was closest to a DRE category IV which assigns a 20 percent impairment, Dr. Koprivica concluded a 20 percent Category

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<sup>15</sup> Koprivica Depo. at 13-15.

IV impairment was the appropriate rating for claimant's March 14, 2000 accidental injury. The doctor noted this rating was consistent with claimant's multiple levels of involvement, multiple surgical procedures and the radicular complaints into both lower extremities.

The Board adopts Dr. Koprivica's findings and modifies the ALJ's award in Docket No. 258,352 to a 20 percent permanent partial whole person functional impairment.

**AWARD IN DOCKET NO. 258,352**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated April 5, 2004, modified to reflect claimant suffered a 20 percent permanent partial whole person functional impairment.

The claimant is entitled to 14.13 weeks of temporary total disability compensation at the rate of \$383 per week or \$5,411.79 followed by 83 weeks of permanent partial disability compensation at the rate of \$383 per week or \$31,789 for a 20 percent functional disability, making a total award of \$37,200.79, which is due, owing and ordered paid in one lump sum less amounts previously paid.

**AWARD IN DOCKET NO. 1,004,916**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated April 5, 2004, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: George H. Pearson, Attorney for Claimant  
Joseph C. McMillan, Attorney for Respondent and Royal  
Eric T. Lanham, Attorney for Respondent and Continental  
Kenneth J. Hursh, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director